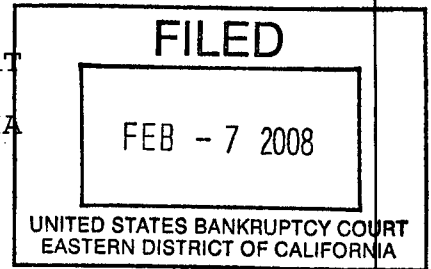


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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION



In re:	)	
PONCE NICASIO BROADCASTING,	)	Case No. 04-26256-B-7
LP,	)	
	)	
Debtor.	)	
<hr/>		
BRUCE FOX,	)	Adv. No. 06-02228-B
Plaintiff,	)	
vs.	)	D.C. No. SOC-1
PONCE NICASIO BROADCASTING,	)	
INC, et al.,	)	
	)	
Respondent(s).	)	Submitted August 21, 2007
<hr/>		

MEMORANDUM DECISION

Moving parties Daniel Briggs, individually and as owner of the Daniel Briggs IRA; Jordan Briggs, individually and as owner of the Jordan Briggs IRA; Jessica Briggs, individually and as owner of the Jessica Briggs IRA, (Jordan Briggs and Jessica Briggs appearing through their parent Daniel Briggs); John Bailey individually and as owner of the John Bailey IRA; Kathleen Bailey, individually and as owner of the Kathleen Bailey IRA; Kristine C. Bailey, individually and as owner of the Kristine Bailey IRA; Steven C. Bailey as parent and guardian for Kate Bailey, individually and as owner of the Kate Bailey IRA, and

1 Jerry Zanelli (the "Former Partners") ask the court to grant them  
2 summary judgment in this adversary proceeding. Plaintiff Bruce  
3 Fox opposes the motion. For the reasons stated herein, the  
4 Former Partners' motion for summary judgment filed on June 26,  
5 2007 (Dkt. 80) (the "Former Partners' PNB LP SJ Motion") is  
6 granted in part.

7 The Former Partners' PNB LP SJ Motion was filed on June 26,  
8 2007, initially set for hearing on July 24, 2007. After one  
9 continuance, the court held a final hearing in Sacramento,  
10 California on August 21, 2007. At the conclusion of the hearing,  
11 the matter was taken under submission.

12 This is a core proceeding and the court has jurisdiction  
13 over this matter. 28 U.S.C. §§ 1334 and 157. Venue is proper in  
14 this court under 28 U.S.C. § 1409. There is no dispute  
15 concerning jurisdiction, venue or core status.

16 The following constitutes the court's findings of fact and  
17 conclusions of law pursuant to Fed. R. Bankr. P. 7052.

#### 18 19 PROCEDURAL HISTORY

20 On June 17, 2004 debtor Ponce Nicasio Broadcasting ("PNB  
21 LP"), a limited partnership, commenced the above captioned  
22 voluntary chapter 7 case (the "PNB LP Case"). Thomas A. Aceituno  
23 was appointed trustee. On September 28, 2005, the court approved  
24 an agreement between the trustee and Plaintiff by which the  
25 trustee assigned his avoidance powers in the PNB LP Case to  
26 Plaintiff.

1 On June 17, 2004 debtor Ponce Nicasio Broadcasting Inc.  
2 ("PNB Inc."), the general partner of PNB LP, also commenced a  
3 voluntary chapter 7 case, no. 04-26255-B-7 (the "PNB Inc. Case").  
4 Thomas A. Aceituno was appointed trustee. On September 28, 2005,  
5 the court approved an agreement between the trustee and Plaintiff  
6 by which the trustee assigned his avoidance powers in the PNB  
7 Inc. Case to Plaintiff.

8 On June 16, 2006, Plaintiff filed two identical (except for  
9 case references, caption, etc.) complaints in the PNB Inc. Case  
10 and the PNB LP Case. The complaint in the PNB LP Case commenced  
11 the instant adversary proceeding, and the complaint in the PNB  
12 Inc. Case commenced Adversary Proceeding 06-2227-B. Although  
13 both complaints lump PNB Inc. and PNB LP together under the term  
14 "Debtors," the above-captioned complaint seeks in part avoidance  
15 of alleged fraudulent transfers made by PNB LP to the Former  
16 Partners. Former partner Daniel Briggs as parent and guardian of  
17 Jordan Briggs and Jessica Briggs filed an answer on November 9,  
18 2006. Former partner John Bailey, Kathleen Bailey, Kristine  
19 Bailey, Steven C. Bailey, and Kate Bailey filed an answer on  
20 December 1, 2007.

21 The Former Partners have also filed a motion for summary  
22 judgment in adversary proceeding 06-2227-B (the "Former Partners'  
23 PNB Inc. SJ motion") that is identical to the Former Partners' PNB  
24 LP SJ Motion. The court has rendered a decision on the Former  
25 Partners' PNB Inc. SJ Motion concurrently with its decision on  
26 the Former Partners' PNB LP SJ Motion.

## 1 I. FACTS

2 The dispute between Plaintiff and the Former Partners arises  
3 out of a business relationship among Plaintiff, PNB LP, and PNB  
4 Inc. PNB LP was formed for the purpose of managing a local  
5 television station. PNB Inc. was formed to act as managing and  
6 general partner of PNB LP. In the mid-to-late 1990s PNB LP  
7 entered into negotiations to sell the television station to  
8 Paxson Communications ("Paxson"). PNB LP also entered into three  
9 agreements with Plaintiff, an Affiliation Agreement (dated May  
10 26, 1995), a Time Brokerage Agreement (dated September 6, 1996),  
11 and an Option Agreement (dated September 6, 1996).

12 Following the execution of the three agreements, Plaintiff  
13 and PNB LP disagreed over whether Plaintiff was entitled to  
14 commissions based on the agreements. Plaintiff sued PNB LP and  
15 PNB Inc. In May 1998 the El Dorado County Superior Court entered  
16 judgment in favor of Plaintiff, awarding him \$38,333.00 under the  
17 Affiliation Agreement and \$53,550.00 under the Time Brokerage  
18 Agreement. The superior court also granted declaratory relief  
19 stating that Plaintiff would be entitled to a three percent  
20 commission under the terms of the Option Agreement in the event  
21 that the television station was sold "under" the terms of the  
22 September 6, 1996 Option Agreement. The California Court of  
23 Appeal affirmed the trial court decision on April 17, 2000, and  
24 on May 16, 2000 PNB LP and PNB Inc. satisfied the money  
25 judgments.

1 The declaratory relief awarded by the superior court,  
2 however, continued to be a point of contention between Plaintiff  
3 and the Ponce Nicasio entities. Concurrently with the litigation  
4 between Plaintiff and PNB LP and PNB Inc., PNB LP had also been  
5 involved in litigation with Paxson. Paxson and PNB LP settled  
6 their dispute in March, 2000. The sale of the television station  
7 closed in June, 2000. PNB LP then took the position that the  
8 sale of the television station did not occur "under" the  
9 September 6, 1996 Option Agreement and that Plaintiff was not  
10 entitled to a commission. Plaintiff disagreed and sought to  
11 enforce the declaratory judgment. On June 21, 2000, Plaintiff  
12 applied for and obtained an order for examination from the El  
13 Dorado County Superior Court. The order for examination was  
14 issued on June 22, 2000.

15 PNB LP then applied for a temporary restraining order to  
16 halt Plaintiff's attempt to collect the commission. On August  
17 28, 2005 the El Dorado County Superior Court vacated its prior  
18 order for examination and enjoined Plaintiff from taking further  
19 action to collect the commission. The superior court also  
20 directed the parties to proceed by evidentiary hearing under  
21 California Civil Procedure Code Section 724.050 to resolve the  
22 issue of whether Plaintiff's judgment had been satisfied. The  
23 date for the evidentiary hearing was set for March 13, 2001.

24 Prior to obtaining the restraining order PNB LP had started  
25 a process by which it intended to buy out the Former Partners,  
26 who were limited partners of the PNB LP at the time. PNB LP  
27  
28

1 hired an accountant to value the capital balance of the  
2 partnership and assess the value of a one percent interest. The  
3 preliminary capital balance was valued at \$13,709,703.38. Each  
4 one percent interest was initially valued at \$137,097.03. PNB LP  
5 then reduced the value of each one percent interest to  
6 \$130,097.03, so as to set aside \$700,000.00 in the event that  
7 Plaintiff were to be awarded a commission following the March  
8 2001 evidentiary hearing. The Former Partners agreed to accept  
9 the reduced valuation of their interests. The Former Partners  
10 held 30.6% of the limited partnership interests at the time of  
11 the buyout transaction. PNB LP transferred funds from its  
12 accounts to the Former Partners. In exchange for the transfer of  
13 funds to each of the Former Partners, PNB LP received a transfer  
14 of the recipient Former Partners' limited partnership interest,  
15 and each recipient Former Partner executed and delivered to PNB  
16 LP a mutual and general release and waiver. The funds  
17 transferred to the Former Partners totaled \$3,980,969.12. The  
18 buyout transactions were concluded as of August 31, 2000.

19 Following the transfers to the Former Partners, PNB Inc.  
20 held funds totaling \$446,871.43 in accounts under its name. PNB  
21 LP held funds totaling \$3,994,567.44 in accounts under its name.  
22 Thereafter, PNB Inc. and PNB LP used the remaining funds to make  
23 stock purchases and to purchase investments on the stock market.  
24 Some funds were also disbursed from one or both PNB LP and PNB  
25 Inc. to partners who remained in the partnership. Plaintiff also  
26 asserts that the disbursement of funds to the remaining partners  
27  
28

1 are also fraudulent transfer, but whether those transfers were  
2 fraudulent is the subject of the identical summary judgment  
3 motions filed under docket control number PP-2 on the court's  
4 dockets in the above-captioned PNB LP Case and in the PNB Inc.  
5 Case.

6 As of the end of 2000, the stock market investments began a  
7 decline in value that would continue for over a year. As of the  
8 end of 2000, PNB Inc. and PNB LP held a total of approximately  
9 \$2,000,000.00 in their accounts. As of the end of March 2001,  
10 PNB Inc. and PNB LP collectively held a total of approximately  
11 \$1,300,000.00 in their accounts. As of June 2001, these assets  
12 had appreciated to \$1,800,000.00. As of August 2001, PNB Inc.  
13 and PNB LP held a total of approximately \$900,000.00 in their  
14 accounts. During the latter half of 2001, the assets of PNB LP  
15 and PNB Inc. dwindled to almost nothing.

16 In August 2001, Plaintiff filed another action in El Dorado  
17 County Superior Court, seeking additional payment under the Time  
18 Brokerage Agreement based on the passage of time from the May  
19 1998 judgment. The superior court entered judgment for Plaintiff  
20 in the amount of \$77,350.00 in July 2003.

21 Also in July 2003 the El Dorado County Superior Court  
22 concluded proceedings under California Civil Procedure Code  
23 Section 724.050, finding that the sale of the television station  
24 from PNB LP to Paxson occurred "under" the Option Agreement. The  
25 superior court awarded Plaintiff \$531,750.00 plus interest.  
26 However, by the time Plaintiff obtained this money judgment,  
27  
28

1 neither PNB LP nor PNB Inc. had sufficient assets to satisfy the  
2 judgment. Both PNB LP and PNB Inc. commenced voluntary  
3 bankruptcy cases in June 2004 following Plaintiff's further  
4 attempts to enforce the money judgment.

## 6 II. ANALYSIS

7 Plaintiff has filed the instant adversary proceeding seeking  
8 to set aside transfers made by PNB LP and PNB Inc. to various  
9 defendants who were formerly limited partners in PNB LP,  
10 including the Former Partners. As to the Former Partners,  
11 Plaintiff seeks to avoid the transfers that PNB LP made to the  
12 Former Partners in August 2000, when the Former Partners were  
13 allegedly bought out by PNB LP in exchange for a return of their  
14 partnership interests and mutual and general releases. Plaintiff  
15 asserts that these transactions were sham transactions and were  
16 conducted for the sole purpose of fraudulently attempting to  
17 remove assets of PNB LP from his reach before he could  
18 successfully obtain and enforce a money judgment. The Former  
19 Partners, not surprisingly, disagree. They argue that the  
20 transfers were not fraudulent under California fraudulent  
21 transfer law, that the transfers were made pursuant to the  
22 provisions of the limited partnership agreement entitling the  
23 Former Partners to a buyout of their interests, and that  
24 sufficient assets were not available to satisfy the debt to  
25 plaintiff due to unforeseen economic forces. The Former Partners  
26 have requested that the court enter summary judgment in their



1 favor, arguing that there is no genuine dispute of material fact  
2 as the fraudulent nature of the disputed transactions and that  
3 they are entitled to judgment as a matter of law.

4  
5 **A. Applicable Law**

6 **1. Summary Judgment**

7 Pursuant to Federal Rule of Civil Procedure 56(c), made  
8 applicable to this proceeding by Federal Rule of Bankruptcy  
9 Procedure 7056, the moving party on a motion for summary judgment  
10 must demonstrate that there is no genuine dispute of material  
11 fact and that the movant is entitled to judgment as a matter of  
12 law. Fed R. Civ. P. 56(c).

13 The initial burden of showing the absence of a material  
14 factual issue is on the moving party. Celotex Corp. v. Catrett,  
15 477 U.S. 317, 323 (1986) ("a party seeking summary judgment always  
16 bears the initial responsibility of informing the district court  
17 of the basis for the motion"); De Horney v. Bank of America Nat'l  
18 Trust & Sav. Assoc., 879 F.2d 459, 464 (9<sup>th</sup> Cir. 1989). If the  
19 moving party would not ultimately bear the burden of persuasion  
20 at trial, the movant may satisfy this burden by showing that the  
21 record lacks substantial evidence supporting the nonmovant's  
22 claim. Celotex, 477 U.S. at 324-26. The movant is not required  
23 to show that it is entitled to relief on each and every element  
24 of the claim for relief. Instead, if the movant can show that  
25 the plaintiff cannot meet the plaintiff's burden of proving a  
26 single necessary element of the first claim for relief, then the

1 movant can prevail. See Adickes v. S.H. Kress & Co., 398 U.S.  
2 144, 158-60 (1970).

3 However, if the movant would ultimately have the burden of  
4 persuasion on an issue, such as successfully raising an  
5 affirmative defense to the action, the movant must shoulder the  
6 burden usually allocated to the plaintiff by showing evidence  
7 that no reasonable jury could disregard. See Edison v. Reliable  
8 Life Ins. Co., 664 F.2d 1130, 1131 (9<sup>th</sup> Cir. 1981); Herndon v.  
9 Massachusetts Gen. Life Ins. Co., 28 F. Supp. 379, 382 (W.D. Va.  
10 1998).

11 Once the movant has met its burden of production, the burden  
12 shifts to the nonmovant to show that there is in fact a genuine  
13 issue for trial. The nonmoving party must identify specific  
14 facts, supported by evidence, affidavits, depositions,  
15 interrogatories, sworn or certified copies of documents, or other  
16 material contemplated by Federal Rule of Civil Procedure 56(e),  
17 which articulate and illustrate the presence of a genuine issue  
18 requiring a trial. Fed R. Civ. P. 56(e); Celotex, 477 U.S. at  
19 324. The evidence presented by the nonmovant must be substantial  
20 and the court must consider the nonmovant's substantive burden of  
21 persuasion at trial. Anderson v. Liberty Lobby, Inc., 477 U.S.  
22 242, 252 (1986). Mere assertions do not constitute facts  
23 sufficient to require a trial. Restating a pleading, submitting  
24 new pleadings, or simply making assertion by legal memorandum or  
25 even by affidavit do not set forth specific facts requiring a  
26 need for trial. The nonmovant must demonstrate that there will  
27

1 be testimonial, documentary, or other evidence to support the  
2 claim. See Celotex, 477 U.S. at 324 (1986); Gasaway v.  
3 Northwestern Mut. Life Ins. Co., 26 F.3d 957, 959-60 (9<sup>th</sup> Cir.  
4 1994). And "[b]ecause 'credibility determinations, the weighing  
5 of the evidence, and the drawing of legitimate inferences from  
6 facts are jury functions, not those of a judge', '[t]he evidence  
7 of the non-movant is to be believed, and all justifiable  
8 inferences are to be drawn in his favor.'" Giles v. GMAC, 494  
9 F.3d 965, 872 (9<sup>th</sup> Cir. 2007) (quoting Anderson, 391 U.S. at 255).

10 In addition to showing that there are no genuine issues of  
11 material fact that require trial, the movant must also show that  
12 it is legally entitled to judgment in its favor. And to defeat  
13 summary judgment, the nonmovant must articulate a viable legal  
14 theory that entitles it to relief should it prevail on the facts  
15 at trial. "The showing of a 'genuine issue for trial' is  
16 predicated upon the existence of a legal theory which remains  
17 viable under the asserted version of the facts, and which would  
18 entitle the party opposing the motion (assuming his version to be  
19 true, to a judgment as a matter of law." Mc Guire v. Columbia  
20 Broadcasting System, Inc., 399 F.2d 902, 902 (9<sup>th</sup> Cir. 1968).

## 22 2. Fraudulent Transfer

23 Both The Former Partners and Plaintiff agree that Plaintiff  
24 is barred from bringing an action to avoid the transfers in  
25 dispute here under 11 U.S.C. Section 548(a), as that section is  
26 limited to avoidance of transfers made within one year of the  
27

1 date of the filing of the petition in the parent bankruptcy case.  
2 The disputed transfers here occurred in 2000; the parent  
3 bankruptcy case was commenced on June 17, 2004. Instead, both  
4 parties agree that Plaintiff may proceed pursuant to California  
5 state law governing fraudulent transfers, as permitted by 11  
6 U.S.C. Section 544(b)(1), which allows the trustee to avoid any  
7 transfer of an interest of the debtor in property that is  
8 voidable under applicable law by a creditor holding an allowed  
9 unsecured claim.

10 Whether the transfer of an interest or an asset of the  
11 debtor to The Former Partners constitutes a fraudulent transfer  
12 in this proceeding is governed by California's version of the  
13 Uniform Fraudulent Transfer Act (the "UFTA"), codified in  
14 California Civil Code Section 3439, et seq. The UFTA covers  
15 transfers that are fraudulent because they were made with actual  
16 intent to hinder, delay, or defraud creditors, and transfers that  
17 are constructively fraudulent because they were made without  
18 receiving reasonably equivalent value in exchange and the debtor  
19 was insolvent at that time or became insolvent as a result of the  
20 transfer. An essential element of a cause of action brought  
21 under the California UFTA that seeks the avoidance of or other  
22 remedies related to an allegedly fraudulent transfer is the  
23 existence of an actual transfer made by the debtor to a third  
24 party.<sup>1</sup>

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25  
26 <sup>1</sup>The court notes that the California UFTA also provides for  
27 a cause of action for remedies related to obligations  
28 fraudulently incurred by the debtor. Here, however, Plaintiff

1 A transfer may also be constructively fraudulent with  
2 respect to a creditor whose claim arose before or after the  
3 transfer if the transfer is made without receiving a reasonably  
4 equivalent value in exchange for the transfer, and the debtor  
5 either was engaged or was about to engage in a business or a  
6 transaction for which the remaining assets of the debtor were  
7 unreasonably small in relation to the business or transaction, or  
8 the debtor intended to incur, or believed or reasonably should  
9 have believed that he or she would incur, debts beyond his or her  
10 ability to pay as they became due. See Cal Civ. Code. §  
11 3439.04(a)(2). A transfer may be constructively fraudulent with  
12 respect to a creditor whose claim arose before the transfer was  
13 made if the debtor made the transfer without receiving a  
14 reasonably equivalent value in exchange for the transfer and the  
15 debtor was insolvent at that time or became insolvent as a result  
16 of the transfer. See Cal. Civ. Code § 3439.05.

17 Pursuant to California Civil Code Section 3439.04(a)(1), a  
18 transfer is fraudulent as to a creditor whose claim arose either  
19 before or after the transfer was made if the transfer was made  
20 with "actual intent to hinder, delay, or defraud any creditor of  
21 the debtor." Cal Civ. Code § 3439.04(a)(1). "Actual intent" is  
22 informed by a non-exclusive list of eleven factors listed under  
23 Section 3439.04(b). The eleven factors include:

24 (1) Whether the transfer or obligation was to an  
25 insider.

26 \_\_\_\_\_  
27 only seeks to avoid fraudulent transfers.

- (2) Whether the debtor retained possession or control of the property after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor was sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Cal Civ. Code § 3439(b)(1)-(11). The eleven factors were added to the statute in 2004. Pursuant to Section 3439.04(c), the addition of the factors to Section 3439 do not constitute a change in applicable law, but are instead declaratory of it and are not intended to affect prior judicial decisions interpreting the statute. The eleven factors do not "create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scale tips in favor of finding actual intent to defraud. [The] list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." Filip v. Bucurenciu, 129 Cal. App. 4<sup>th</sup> 825, 834 (2005).

1 The statute also provides a defense to a fraudulent transfer  
2 action. Pursuant Section 3439.08(a), a transfer is not voidable  
3 against a person who took in good faith and for reasonably  
4 equivalent value or against any subsequent transferee or obligee  
5 taking from such a person. Cal. Civ. Code § 3439.08(a).

6  
7 **C. The Former Partners Have Not Established Entitlement to**  
8 **Summary Judgment on Their Affirmative Defense**

9 The court's analysis of the Former Partners' entitlement to  
10 summary judgment begins with their assertion of an affirmative  
11 defense to Plaintiff's claim for relief under Cal. Civ. Code §  
12 3439.08. The Former Partners assert that they took the transfers  
13 from PNB LP in good faith and for reasonably equivalent value.  
14 The Former Partners assert that in exchange for the money  
15 received from the PNB LP, they transferred their limited  
16 partnership interests, gave a release of liability, and provided  
17 "substantial funds for the Fox matter." (Dkt. 83 at 30). The  
18 Former Partners argue that these things constitute "reasonably  
19 equivalent value" for the purposes of Section 3439.08(a).

20 The Former Partners' argument is not persuasive. The court  
21 finds that the buyout transaction was not an exchange for  
22 reasonably equivalent value. Although the California UFTA does  
23 not define "reasonably equivalent value" it does define "value"  
24 generally:

25 Value is given for a transfer or obligation if, in  
26 exchange for the transfer or obligation, property is  
27 transferred or an antecedent debt is secured or  
28 satisfied, but value does not include an unperformed  
promise made otherwise than in the ordinary course of

1 the promisor's business to furnish support to the  
2 debtor or another person.

3 Cal. Civ. Code § 3439.03. Here, the Former Partners argue that  
4 the buyout transaction should be treated as the satisfaction of  
5 an antecedent debt because PNB LP was "obligated under an express  
6 provision in [the limited partnership agreement] to buy them out.  
7 This pre-existing obligation was an express contractual  
8 requirement, subject to enforcement by the limited partners, and  
9 is an antecedent debt for purposes of determining value." (Dkt.  
10 83 at 30).

11 The argument fails. First, the court notes that the Former  
12 Partners have not pointed to any specific provision in the  
13 amended limited partnership agreement (Dkt. 85 at 50-76) that  
14 constitutes an express provision to buy out the Former Partners.  
15 The Former Partners do assert that the limited partnership  
16 agreement includes a "'mandatory purchase' provision, whereby the  
17 partnership was required to buy out interests of limited  
18 partners." (Dkt. 83 at 13). However, Section XX of the limited  
19 partnership agreement, under the heading "Mandatory Purchase"  
20 (Dkt. 85 at 67) provides that each Class "B" limited partner has  
21 the option to sell his or her interest to either the general  
22 partner or the partnership, and the general partner specifically  
23 agrees to purchase the limited partnership interest. Class "B"  
24 limited partners are defined elsewhere in the partnership  
25 agreement, and include only Carmen Briggs, Yolanda Nava, and Mary  
26 Ann Alonzo. (Dkt. 85 at 54). The Former Partners are not  
27 defined as Class "B" limited partners. They have also submitted



1 no evidence that they are Class "B" limited partners. The other  
2 class of limited partners under the agreement are Class "A"  
3 limited partners, who are defined as "those persons who purchase  
4 Class 'A' units and are admitted as Partners." (Dkt. 85 at 54).  
5 The Former Partners have cited no specific provision in the  
6 agreement that provides for the mandatory purchase of a Class "A"  
7 partnership interest, and the court finds none. As a result, the  
8 court finds no provision in the agreement that constituted either  
9 an "express contractual requirement" or a "pre-existing  
10 obligation" to buy out the Former Partners.

11 The Former Partners have failed to show that the buyout  
12 transaction constituted payment of an antecedent debt. Section  
13 3439.01 of the California UFTA defines a debt as a "liability on  
14 a claim." The Former Partners have cited no authority for the  
15 proposition that partnership interests generally are considered  
16 to be claims against the partnership. "[A]n ownership interest  
17 in a debtor partnership differs fundamentally from other rights  
18 that might be asserted against the partnership." In re  
19 Riverside-Linden Inv. Co., 925 F.2d 320, 323 (9<sup>th</sup> Cir. 1991).  
20 "An ownership interest is not a debt of the partnership.  
21 Partners own the partnership subject to the profits or losses.  
22 Creditors, however, hold claims regardless of the performance of  
23 the partnership business. Thus, an ownership interest is not a  
24 claim against the partnership." In re Riverside-Linden Inv. Co.,  
25 99 B.R. 439, 444 (9<sup>th</sup> Cir. BAP 1989), aff'd 925 F.2d 320 (9<sup>th</sup>  
26 Cir. 1991). The Bankruptcy Code also provides some guidance on  
27

1 this point. The Code does not consider partnership interests to  
2 be debts, but instead classifies partnership interests as "equity  
3 security." 11 U.S.C. § 101(15) (West 2004).

4 Second, even though a partner's transferable interest in a  
5 partnership is considered personal property, see Cal. Corp. Code  
6 § 16502, the court finds that the transfer of the limited  
7 partnership interests does not constitute a transfer of value for  
8 the purposes of the California UFTA. The legislative comments to  
9 the statute state that "[c]onsideration having no utility from a  
10 creditor's viewpoint does not satisfy the statutory definition"  
11 of value. Cal. Civ. Code § 3439.03 (West supp. 1995) legislative  
12 committee comment-assembly 1986 addition, ¶ 2 (West supp. 1995);  
13 see also In re Lucas Dallas Inc., 185 B.R. 801, 807-808 (9<sup>th</sup> Cir.  
14 BAP 1995). The legislative comment also states that the section  
15 is "in accord with California cases which hold that fairness of  
16 consideration is to be judged from the standpoint of the  
17 creditors of the debtor." Cal. Civ. Code § 3439.03 (West supp.  
18 1995) legislative committee comment-assembly 1986 addition, ¶ 2  
19 (West supp. 1995). Here, the transfer of funds from the accounts  
20 of PNB LP to the Former Partners reduced the size of the pool of  
21 assets to which Plaintiff could have looked for the payment of  
22 his debt. The transfer of the limited partnership interests and  
23 releases in exchange for the transferred funds are of  
24 insignificant value to Plaintiff. From Plaintiff's point of  
25 view, the buyout transaction amounted to nothing more than a  
26 reduction in PNB LP's assets.

1 Because the court finds that the Former Partners have not  
2 shown that they received the transfers of funds from PNB LP in  
3 exchange for reasonably equivalent value, the court need not  
4 reach the issue of whether the Former Partners received the  
5 transfers in good faith.

6  
7 **D. The Former Partners Are Entitled to Summary Judgment Under**  
8 **California Civil Code Section 3439.05**

9 Although the Former Partners have not established  
10 entitlement to summary judgment in their favor by way of their  
11 affirmative defense, they have established entitlement to summary  
12 judgment in their favor on Plaintiff's claim for relief under  
13 California Civil Code Section 3439.05. As discussed above, a  
14 transfer is fraudulent under Section 3439.05 if it is made  
15 without receiving reasonably equivalent value in exchange for the  
16 transfer and the debtor was insolvent at the time of the transfer  
17 or became insolvent as a result of the transfer.

18 For the reasons discussed in Sub-part C, supra, the Former  
19 Partners have not sustained their initial burden of showing that  
20 the debtor transferred funds to them in exchange for reasonably  
21 equivalent value. However, despite the Former Partners' failure  
22 to show that the transfers were for reasonably equivalent value,  
23 they can still sustain their initial burden of showing  
24 entitlement to summary judgment if they present evidence that PNB  
25 LP was not insolvent at the time of the transfers and did not  
26 become insolvent as result of the transfers, as Plaintiff would  
27 bear the ultimate burden of proving a claim for relief under

1 Section 3439.05 at trial. To sustain their initial burden, the  
2 Former Partners need only show that Plaintiff cannot prove one  
3 essential element of the claim.

4 The Former Partners have sustained their initial burden of  
5 showing that the transfers made in connection with the buyout  
6 transaction were not made at a time when PNB LP was insolvent,  
7 and they have also presented evidence that PNB LP did not become  
8 insolvent as a result of the transfers. Under the California  
9 UFTA, a debtor which is a partnership is insolvent if "at fair  
10 valuations, the sum of the partnership's debts is greater than  
11 the aggregate of all of the partnership's assets and the sum of  
12 the excess of the value of each general partner's nonpartnership  
13 assets over the partner's nonpartnership debts. Cal. Civ. Code §  
14 3439.02(b). A judgment debtor's insolvency is also relevant to  
15 whether a transfer was made with actual intent to delay hinder an  
16 defraud a creditor. See Cal. Civ. Code § 3439.04(b)(9).

17 Here, the Former Partners have submitted the declaration of  
18 Ron V. Briggs, President of PNB Inc. and a limited partner of PNB  
19 LP, as evidence that PNB LP was not insolvent. The declaration  
20 states that as of June 30, 2003, the total preliminary capital  
21 balance of PNB LP as determined by CPA Robert Bell was  
22 \$13,709,703.38. This statement is supported by a copy of the  
23 calculation of the preliminary capital balance, dated August 24,  
24 2000. (Dkt. 85 at 116). The declaration further states that as  
25 of August 31, 2000, after the transfers to the Former Partners,  
26 PNB Inc. held \$446,871.43 in its account, and PNB LP held  
27

1 \$3,9994,567.44. (Dkt. 82 at 8). This statement is supported by  
2 copies of account statements of both PNB LP and PNB Inc. for the  
3 month ending August 31, 2000. (Dkt. 85 at 130). The declaration  
4 also states that neither PNB Inc. or PNB LP had material debts at  
5 the time. (Dkt. 82 at 8).<sup>2</sup> Through this evidence the Former  
6 Partners have sustained their initial burden on the insolvency  
7 prong of Section 3439.05.

8 Plaintiff's opposition fails to defeat the Former Partners'  
9 request for summary judgment on any claim under Section 3439.05.  
10 Plaintiff has failed to come forward with substantial evidence  
11 that shows the existence of a genuine issue that requires a  
12 trial. Plaintiff's argument that PNB LP became insolvent  
13 immediately following the transfers to the Former Partners rests  
14 on his theory that both PNB Inc. PNB LP ceased to exist after the  
15 Former Partners were bought out. Plaintiff argues that not only  
16 were the Former Partners bought out, but those partners who the  
17 Former Partners allege remained in the partnership, including Ron  
18 V. Briggs, Ronald J. Briggs, Brian Briggs, and Alexander Briggs,  
19 also took distributions amounting to the remainder of PNB LP's  
20 assets. Plaintiff argues that the remaining partners simply  
21 continued to use the accounts of PNB Inc. and PNB LP as either  
22 their personal accounts or the accounts of "some form of general  
23 partnership, with Ron Briggs installed in as the general partner,  
24 with full authority to disburse assets as he chose, without  
25

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26 <sup>2</sup>Even including Plaintiff's eventual claim of \$531,750.00,  
27 the assets of PNB Inc. and PNB LP far exceeded the amount of that  
claim.

1 regard to PNB LP or PNB Inc. creditors." (Dkt. 93 at 19).  
2 Plaintiff argues that the "new" entity was a personal investment  
3 company that engaged in high-risk investments. (Dkt. 93 at 8).  
4 Plaintiff also argues that PNB LP ceased to exist because PNB  
5 Inc., as the general partner of the limited partnership, ceased  
6 to exist when it "repurchased all of its own stock, essentially  
7 devouring itself and creating a non-entity." (Dkt. 93 at 7).

8 Plaintiff makes a number of assertions and allegations  
9 regarding the insolvency of PNB LP and PNB Inc., but he fails to  
10 present substantial evidence that they were insolvent at the time  
11 of the transfers to the Former Partners or that they became  
12 insolvent as a result of the transfers. Plaintiff's only  
13 evidence that PNB Inc. and PNB LP ceased to exist as "viable  
14 entities" following the transfers consists of excerpts deposition  
15 testimony of Ron V. Briggs. (Dkt. 93 at 23-50). Plaintiff  
16 points to Briggs' statement that all shares of stock in PNB Inc.  
17 were signed over to PNB Inc. at the time of the transfer to The  
18 Former Partners and remained in the treasury (Dkt. 93 at 30) as  
19 evidence that PNB Inc. ceased to exist. Plaintiff also points to  
20 Briggs' statements that records for the partnership or  
21 corporation were not maintained or were lost due to obsolescence  
22 of the computer software used to maintain them (Dkt. 93 at 23,  
23 76) as evidence that neither the corporation nor the partnership  
24 continued to exist after the transfers. Plaintiff asserts that  
25 it is "fundamental law" that in order to exist the entities must  
26 have maintained records, had shareholders, and conducted

1 directors' or shareholders' meetings. Plaintiff also argues that  
2 because the limited partnership agreement states that the purpose  
3 of the limited partnership was to "acquire, own, operate,  
4 develop, manage or otherwise engage in the business relating to  
5 the operating of a television station," (Dkt. 85 at 51), the  
6 partnership ceased to exist after the television station was sold  
7 to Paxson and the partnership agreement was not amended to  
8 reflect a new purpose. Plaintiff asserts that his evidence shows  
9 that there is a genuine issue of material fact as to whether PNB  
10 LP was solvent after the transfers to the Former Partners.

11       The argument fails. Despite the allegedly fundamental  
12 nature of the law underpinning Plaintiff's theories of corporate  
13 and partnership dissolution and insolvency, Plaintiff has cited  
14 no legal authority that supports his assertion that a corporation  
15 is automatically dissolved when its directors or officers lose or  
16 fail to maintain corporate records, or when it redeems all shares  
17 of its stock and retains the shares without offering them for  
18 sale. The court is unaware of any such authority. Plaintiff's  
19 argument is probably derived from the concept of "piercing the  
20 corporate veil." However, "piercing the corporate veil" does not  
21 destroy the entity; it only creates liability to the extent  
22 necessary to prevent a fraud. "When it is claimed that a parent  
23 corporation should be liable because it is the alter ego of its  
24 subsidiary, equity commands that the corporate wall be breached.  
25 Yet the wall remains; the parent is liable through the acts of  
26  
27  
28

1 the subsidiary, but as a separate entity." Mesler v. Bragg  
2 Management Co., 39 Cal.3d 290, 301, 702 P.2d 601, 607 (1985).

3 Thus, Plaintiff's argument that a theory of alter ego  
4 liability should be applied to a theory of dissolution fails.  
5 Plaintiff has also not shown that either PNB LP or PNB Inc. were  
6 dissolved under accepted theories of dissolution. Under  
7 California law, dissolution of a corporation can be either  
8 involuntary and accomplished by court proceeding, see Cal. Corp.  
9 Code § 1800 et. seq., or voluntarily accomplished by the election  
10 of the board of directors or shareholders, see Cal. Corp. Code §  
11 1900 et. seq. Plaintiff has submitted no court decree or order  
12 winding up and dissolving PNB Inc. that evinces an involuntary  
13 dissolution of the corporation. See Cal. Corp. Code § 1804. Nor  
14 has Plaintiff submitted any certificate of dissolution that  
15 evinces a voluntary dissolution of the corporation. See Cal.  
16 Corp. Code § 1905.

17 Similarly, under California law a limited partnership is  
18 dissolved and its affairs are wound upon the first to occur of  
19 the four following events:

20  
21 1.) At the time specified, or on the occurrence of  
22 events provided in the partnership agreement. Cal.  
23 Corp. Code § 15681(a).

24 2.) Upon the written consent of all general partners  
25 and a majority in interest of the limited partners,  
26 unless otherwise provided in the partnership agreement.  
27 Cal. Corp. Code § 15681(b).



1 3.) Unless otherwise provided in the partnership  
2 agreement, when a general partner ceases to be a  
3 general partner pursuant to the provisions of Cal.  
4 Corp. Code § 15642, unless (1) there is one or more  
5 remaining general partners that agree to continue the  
6 business, or (2) a majority in interest of the limited  
7 partners agree in writing to continue the partnership  
8 and, within six months after the last remaining general  
9 partner ceases to be a partner, admit one or more new  
10 general partners. Cal. Corp. Code § 15681(c). If the  
11 general partner is a corporation, the corporation  
12 ceases to be a general partner pursuant to Corporations  
13 Code Section 15642 upon the filing of a certificate of  
14 dissolution or its equivalent. Cal. Corp. Code §  
15 15642(h).

16 4.) Entry of a judicial decree of dissolution. Cal.  
17 Corp. Code. § 15681(d).

18 Plaintiff has provided no evidence that any of the events  
19 listed above has occurred that caused either PNB Inc. or PNB LP  
20 to "cease to exist" immediately after the transfers to the Former  
21 Partners. Rather, it appears that Plaintiff confuses theories of  
22 alter ego liability and partner liability with theories of  
23 dissolution. Whether or not a director or officer is liable for  
24 the actions of a corporation, and whether or not a partner is  
25 liable for the actions of a partnership such that the entities  
26 intended to limit liability should be disregarded does not  
27

1 necessarily lead to a conclusion that the corporation or  
2 partnership does not exist. Nor does it lead to a conclusion  
3 that informs the issue at hand here, which is whether the limited  
4 partnership was insolvent before the transfers to the Former  
5 Partners or became insolvent as a result of the transfers to the  
6 Former Partners. Whether Ron Briggs or any other person  
7 subsequently treated funds held in the accounts of PNB LP or PNB  
8 Inc. as the funds of a separate business venture or even his own  
9 personal funds does not compel the conclusion that either PNB  
10 Inc. or PNB LP was insolvent at the time of the buy out  
11 transactions or became insolvent as a result of them.

12 As a result, the court finds that in response to the Former  
13 Partners' initial showing of entitlement to summary judgment on  
14 Plaintiff's claim for relief under Cal. Civ. Code § 3439.05,  
15 Plaintiff has not come forward with substantial evidence to show  
16 either that PNB LP was insolvent at the time of the disputed  
17 transfers or that PNB LP became insolvent as a result of them.  
18 Furthermore, the evidence in the record shows that the Former  
19 Partners are entitled to judgment as a matter of law.  
20 Accordingly, the Former Partners are entitled to summary judgment  
21 that Plaintiff take nothing by his claim for relief under Cal.  
22 Civ. Code § 3439.05.

23  
24  
25 **E. The Former Partners Are Entitled to Summary Judgment Under  
California Civil Code Section 3439.04(a)(2).**

26 The Former Partners have also established that they are  
27 entitled to summary judgment on Plaintiff's claim for relief

1 under California Civil Code Section 3439.04(a)(2). As discussed  
2 above, pursuant to Section 3439.04(a)(2), a transfer is  
3 fraudulent as to a creditor who claim arose either before or  
4 after the transfer was made if the transfer was made without  
5 receiving a reasonably value in exchange for the transfer or  
6 obligation, and the debtor either was engaged or was about to  
7 engage in a business or a transaction for which the remaining  
8 assets of the debtor were unreasonably small in relation to the  
9 business or transaction, or the debtor intended to incur or  
10 believed or reasonably should have believed that it would incur  
11 debts beyond its ability to pay as they came due.

12 For the reasons discussed in Sub-part C, supra, the Former  
13 Partners have not sustained their initial burden of showing that  
14 the debtor transferred funds to them in exchange for reasonably  
15 equivalent value. However, despite the Former Partners' failure  
16 to show that the transfers were for reasonably equivalent value,  
17 they can still sustain their initial burden of showing  
18 entitlement to summary judgment if they present evidence that  
19 would lead to a finding in their favor under either Section  
20 3439.04(a)(2)(A) or (B), as Plaintiff bears the ultimate burden  
21 of proving a claim for relief under Section 3439.04(a)(2) at  
22 trial. To sustain their initial burden, the Former Partners need  
23 only show that Plaintiff cannot prove one essential element of  
24 the claim.

25 The Former Partners have sustained their initial burden of  
26 showing that at the time PNB LP made the transfers to them, PNB  
27

1 LP was not about to engage in a business or transaction for which  
2 its remaining assets were unreasonably small, or that PNB  
3 intended to incur or reasonably believed that it would incur  
4 debts beyond its ability to pay as they came due. As discussed  
5 in Sub-part D, supra, the Former Partners have submitted evidence  
6 that both PNB Inc. and PNB LP had substantial funds in their  
7 accounts following the transfers to The Former Partners in August  
8 2000. the Former Partners have also submitted evidence that the  
9 limited partners whose interests were not bought out used the  
10 funds in the accounts of PNB LP and PNB Inc. to purchase  
11 investments on the stock market. (Dkt. 82 at 7). Although the  
12 value of the investments acquired would drop significantly during  
13 2001, the Former Partners assert that they did not incur debt.  
14 The Former Partners have also presented evidence that the decline  
15 in value of the investments during 2001 was unexpected, and that  
16 during 2000 and most of 2001 PNB LP held funds in its accounts  
17 sufficient to pay any claim that Plaintiff might obtain. (Dkt.  
18 82 at 10).

19 Plaintiff's opposition fails to defeat the Former Partners'  
20 request for summary judgment on any claim under Section  
21 3439.04(a)(2). Plaintiff has failed to come forward with  
22 substantial evidence that shows the existence of a genuine issue  
23 that requires a trial. Although the court has found that the  
24 Former Partners have not established that the transfers made to  
25 them were for reasonably equivalent value, Plaintiff fails to  
26 address either Section 3439.04(a)(2)(A) or (a)(2)(B) in his  
27

1 response. Plaintiff does present evidence in the form of the  
2 declaration of CPA Jeffrey Rogers (the "Rogers Declaration") that  
3 after PNB LP made the transfers to the Former Partners, the  
4 investment patterns of the "entities" shifted from investments in  
5 mutual funds to "individual stocks and very large margin  
6 borrowing to leverage the accounts." (Dkt. 99 at 2). The Rogers  
7 Declaration does not present any evidence regarding the degree to  
8 which the remaining limited partners or the general partner  
9 borrowed on margin, and as a result fails to show sufficient  
10 evidence that raises an genuine issue for dispute as to PNB LP or  
11 PNB Inc.'s remaining assets after the transfers to the Former  
12 Partners were unreasonably small for the investment strategy  
13 undertaken, or whether the investment strategy involved incurring  
14 debt that exceeded the remaining assets such that the debt could  
15 not be repaid when it came due. Furthermore, the Rogers  
16 Declaration is not sufficient to support Plaintiff's assertion in  
17 response to the Former Partners' statement of undisputed facts  
18 that "Ron's new business obviously was not adequately funded for  
19 a high-risk venture." (Dkt. 95 at 6). Instead, Plaintiff again  
20 relies on his argument that both PNB LP and PNB Inc. "ceased to  
21 exist" after the transfers to The Former Partners. For the  
22 reasons stated in Sub-part D, supra, the court has found that  
23 argument to be unpersuasive.

24 As a result, the court finds that in response to the Former  
25 Partners' initial showing of entitlement to summary judgment on  
26 Plaintiff's claim for relief under Cal. Civ. Code §  
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1 3439.04(a)(2), Plaintiff has not come forward with substantial  
2 evidence that at the time of the transfers PNB LP and PNB Inc.  
3 were about to engage in a business or transaction for which the  
4 remaining assets of either entity would prove unreasonably small,  
5 or that either PNB LP or PNB Inc. intended to incur or reasonably  
6 should have believed that it would incur debts beyond its ability  
7 to pay as they came due. The evidence in the record further  
8 shows that the Former Partners are entitled to judgment as a  
9 matter of law. Accordingly, the Former Partners are entitled to  
10 summary judgment that Plaintiff take nothing by his claim for  
11 relief under Cal. Civ. Code § 3439.04(a)(2).

12  
13 **F. The Former Partners Are Entitled to Summary Judgment Under**  
14 **California Civil Code Section 3439.04(a)(1)**

15 Finally, the court turns to the question of whether there is  
16 a genuine issue of material fact as to whether PNB LP made the  
17 transfers to the Former Partners with "actual intent to hinder,  
18 delay, or defraud a creditor" under California Civil Code Section  
19 3439.04(a)(1). As discussed above, "actual intent" is informed  
20 by eleven factors set forth in Section 3439.04(b), and listed in  
21 Sub-part A(2), supra. In analyzing each factor, the court  
22 considers first whether the Former Partners have met their  
23 initial burden of showing evidence that would entitle them to  
24 judgment that Plaintiff take nothing by this claim, and then  
25 considers whether Plaintiff has presented evidence sufficient to  
26 show that there is a genuine issue as to the actual intent of PNB

1 LP or PNB Inc., bearing in mind that Plaintiff would bear the  
2 burden of proving actual intent at trial.

3 Factor 1: Whether the transfer was to an insider. The  
4 Former Partners concede that, as limited partners at the time the  
5 transfers were made, that they were insiders. Plaintiff agrees  
6 and does not dispute this assertion.

7 Factor 2: Whether the debtor retained possession or control  
8 of the property transferred after the transfer. The Former  
9 Partners assert that neither PNB LP nor PNB Inc. retained control  
10 of the funds transferred to The Former Partners after the  
11 transfers. Ron V. Briggs' declaration states that "PNB  
12 maintained no interest in the funds it disbursed, and, likewise,  
13 the departed limited partners' association with PNB ended."  
14 (Dkt. 82 at 7).

15 Plaintiff disputes the Former Partners' assertion, but  
16 Plaintiff has not presented evidence that raises a genuine issue  
17 as to whether PNB LP or PNB Inc. retained control of the  
18 transferred funds. Plaintiff argues that under the terms of the  
19 releases executed by the Former Partners, they retained an  
20 interest in future profits. However, whether the Former Partners  
21 retained an interest in future profits of either PNB LP or PNB  
22 Inc. has no relation to whether either PNB entity retained  
23 control of funds already transferred to the Former Partners.  
24 Plaintiff also again raises his contention that the PNB entities  
25 no longer existed after the transfers, a contention that the  
26  
27  
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1 court, for reasons previously described in this decision, has  
2 found not to be a genuine issue for trial.

3 Factor 3: Whether the transfer was disclosed or concealed.

4 The Former Partners assert and have presented evidence that the  
5 ownership structure of PNB LP was a matter of public record both  
6 through its Federal Communications Commission License and through  
7 court records related to the ongoing litigation between Plaintiff  
8 and the PNB entities. (Dkt. 82 at 10). The Former Partners  
9 assert that the transfers to them were not concealed.

10 Plaintiff's opposition does not address this factor and he  
11 presents no evidence that the transfers were concealed.

12 Factor 4: Whether before the transfer was made, the debtor  
13 had been sued or threatened with suit. The Former Partners  
14 concede that prior to the transfers, Plaintiff had sued PNB LP  
15 and PNB Inc. in El Dorado County Superior Court, and had obtained  
16 both a money judgment against the PNB LP and PNB Inc. and a  
17 declaratory judgment that Plaintiff was entitled to a three  
18 percent commission if the television station were sold "under"  
19 the terms of the September 6, 1996 Option Agreement. Upon the  
20 sale of the television station in June 2000, Plaintiff attempted  
21 to enforce the judgment by applying for and receiving an order  
22 for examination in the superior court. PNB LP and PNB Inc.  
23 disputed Plaintiff's claim for payment on the judgment and sought  
24 to have the order for examination vacated. The order was not  
25 vacated until August 28, 2000, three days before the Former  
26 Partners executed the agreements transferring their limited  
27



1 partnership interests back to PNB LP in exchange for the  
2 transfers. Upon vacating the order, the superior court also  
3 issued a scheduling order for the purpose of resolving the matter  
4 of whether Plaintiff's judgment had been satisfied. The evidence  
5 in the record shows that PNB LP and PNB Inc. were threatened with  
6 suit for the enforcement of the judgment in Plaintiff's favor  
7 prior to the transfers.

8       The Former Partners' assertion that Plaintiff improperly  
9 obtained the order for examination and that the order was later  
10 vacated is not relevant to an analysis of this factor, as the  
11 factor only asks whether debtor had been sued or threatened with  
12 suit.

13       Plaintiff does not dispute the Former Partners' account of  
14 events, only their significance. Plaintiff emphasizes that on  
15 May 29, 1998, more than two years before the transfers, he had  
16 obtained a judgment against the PNB LP and PNB Inc., a copy of  
17 which is included in The Former Partners' exhibits. (Dkt. 85 at  
18 4). However, the significance of or the weight to be given the  
19 facts underpinning this factor is not a question of fact that  
20 requires a trial, but a legal question. Accordingly, the court  
21 finds that there is no genuine issue of fact as to this factor  
22 that requires a trial.

23  
24       Factor 5: Whether the transfer was of substantially all the  
25 debtor's assets. The Former Partners have presented evidence  
26 that the transfers made to them did not consists of substantially  
27 all of the assets of either PNB LP or PNB Inc. As discussed

1 elsewhere in this decision, the Former Partners have presented  
2 evidence that substantial funds remained in PNB LP and PNB Inc.'s  
3 accounts following the transfers.

4 Plaintiff does not address this factor in his opposition.  
5 Plaintiff has also presented no evidence that the transfers made  
6 to the Former Partners here consisted of substantially all of the  
7 assets of PNB LP or PNB Inc. Plaintiff has not shown that there  
8 is any genuine issue as to this factor that requires a trial.

9 Factor 6: Whether the debtor absconded. The Former Partners  
10 assert that there is no evidence that either PNB LP or PNB Inc.  
11 absconded. Plaintiff does not address this factor in his  
12 opposition, and has presented no evidence that either PNB LP or  
13 PNB Inc. absconded. As to this factor, Plaintiff has not shown  
14 the existence of a genuine issue for trial.

15 Factor 7: Whether the debtor removed or concealed assets.  
16 The Former Partners assert that the assets of both PNB LP and PNB  
17 Inc. were not removed or concealed. They assert that there is no  
18 evidence that assets were removed or concealed. As discussed  
19 elsewhere in this decision, The Former Partners have presented  
20 evidence that substantial funds remained in accounts held by PNB  
21 LP and PNB Inc. at the time of the transfers.

22 In opposition, Plaintiff continues to argue that the PNB  
23 entities did not exist after the transfers. Presumably,  
24 Plaintiff disputes The Former Partners' position on this factor  
25 because, in Plaintiff's view, neither PNB Inc. nor PNB LP could  
26 conceal or remove assets if neither entity existed. However, for  
27

1 reasons discussed elsewhere in this decision, Plaintiff has not  
2 presented any evidence that raises a genuine issue as to whether  
3 PNB LP or PNB Inc. continued to exist or were dissolved after the  
4 transfers. As to this factor, Plaintiff has failed to present  
5 sufficient evidence that shows there is a genuine issue for  
6 trial.

7 Factor 8: Whether the value of the consideration received by  
8 the debtor was reasonably equivalent to the value of the asset  
9 transferred or the amount of the obligation incurred. For the  
10 reasons stated in Sub-part C, supra, the court has found that the  
11 Former Partners have not carried their initial burden of  
12 presenting evidence sufficient to show that PNB LP received  
13 reasonably equivalent value for the transfers. The court has  
14 determined as a matter of law that the transaction by which The  
15 Former Partners were bought out was not a transfer for reasonably  
16 equivalent value for the purposes of the California UFTA. The  
17 same analysis applies to this factor. As to this factor, the  
18 court finds that there is no genuine issue of material fact that  
19 the transfers were not made for reasonably equivalent value.

20 Factor 9: Whether the debtor was insolvent or became  
21 insolvent shortly after the transfer was made or the obligation  
22 was incurred. For the reasons stated in Sub-part D, supra, The  
23 Former Partners have sustained their initial burden of showing  
24 evidence that neither PNB LP nor PNB Inc. were insolvent at the  
25 time of the transfers. For the same reasons, Plaintiff has  
26 failed to show substantial evidence of either PNB entity's  
27

1 insolvency at the time of the transfers that raises a genuine  
2 issue of material fact requiring a trial. As to this factor, the  
3 court finds that there is no genuine issue of material fact that  
4 either PNB entity was insolvent at the time of the transfers, or  
5 that either entity became insolvent as a result of the transfers.

6 Factor 10: Whether the transfer occurred shortly before or  
7 shortly after a substantial debt was incurred. The Former  
8 Partners have carried their initial burden of establishing that  
9 there is no evidence in the record that either PNB LP or PNB Inc.  
10 incurred substantial debt either shortly before or shortly after  
11 the transfers to The Former Partners. Under the evidence  
12 submitted by The Former Partners, shortly before the transfers  
13 neither PNB entity had incurred a debt that was substantial  
14 relative to the assets of the entities. Similarly, neither  
15 entity had incurred any debt shortly after the transfers. The  
16 evidence in the record shows that any debt that may have been  
17 allegedly owed to Plaintiff at the time of the transfers was not  
18 substantial in relation to the total remaining assets of PNB LP  
19 and PNB Inc. Plaintiff's opposition does not address this  
20 element, except to the extent that Plaintiff argues that the PNB  
21 entities could not incur debt after the transfers because the  
22 entities no longer existed. That argument has been found  
23 unpersuasive, however. Plaintiff has not presented evidence that  
24 raises a genuine issue of material fact as to this element.

25 Factor 11: Whether the debtor transferred the essential  
26 assets of the business to a lienholder who transferred the assets  
27

1 to an insider of the debtor. The Former Partners assert that  
2 there is no evidence in the record showing that either PNB LP or  
3 PNB Inc. transferred the essential assets of the business to a  
4 lienholder who transferred the assets to an insider of PNB LP or  
5 PNB Inc. Plaintiff does not address this factor in his  
6 opposition, and has presented no evidence that this occurred in  
7 this case.

8 Based on the foregoing analysis, the court finds that  
9 Plaintiff has not established that there are any genuine issues  
10 of triable fact with regard to either PNB LP or PNB Inc.'s  
11 "actual intent" with respect to the transfers made to the Former  
12 Partners. Plaintiff has failed to meet his burden of presenting  
13 substantial evidence that shows a genuine issue of material fact  
14 as to any of the eleven factors listed under California Code of  
15 Civil Procedure Section 3439.04(b), and, accordingly there is no  
16 genuine issue of material fact as to PNB LP or PNB Inc.'s actual  
17 intent.

18 Of the eleven factors under Section 3439.04(b), the evidence  
19 in the record shows that three of those factors, including the  
20 fact that the Former Partners were insiders of PNB LP, the fact  
21 that PNB LP and PNB Inc. had been threatened with suit and  
22 Plaintiff held a judgment against PNB LP and PNB Inc., and the  
23 fact that the PNB LP and PNB Inc. did not receive reasonably  
24 equivalent value for the funds received by the Former Partners,  
25 weigh in favor of a finding of actual intent on the basis of the  
26 evidence in the record. Eight of the eleven factors, however,  
27

1 weigh against a finding of actual intent on the basis of the  
2 evidence in the record. Of those eight factors, the court finds  
3 two - the fact that the funds received by the Former Partners did  
4 not constitute all of either PNB LP or PNB Inc.'s assets, and the  
5 fact that the neither PNB LP nor PNB Inc. were insolvent at the  
6 time that transfers were made to the Former Partners, and that  
7 neither became insolvent as a result of the transfers - to be  
8 particularly informative with respect to the facts of this case.  
9 The court also finds the fact that the Former Partners agreed to  
10 accept a reduced valuation of their partnership interests when  
11 they were bought out by PNB LP, and the fact that the value they  
12 received was reduced specifically for the purpose of setting  
13 aside funds that would satisfy any money judgment related to a  
14 commission that Plaintiff would eventually obtain, mitigate  
15 against the possibility that at the time the Former Partners were  
16 bought out that either PNB LP or PNB Inc. intended to hinder,  
17 delay, or defraud Plaintiff. Whether such an intent may have  
18 existed at some later time when the assets of PNB LP and PNB Inc.  
19 were further reduced is not of consequence as to the transfers  
20 made to the Former Partners. Accordingly, the court finds that  
21 the Former Partners' are entitled to summary judgment that  
22 Plaintiff take nothing by his claim for relief under Section  
23 3439.04(a)(1). ;::

1       **G. The Former Partners Are Entitled to Summary Judgment on**  
2       **Plaintiff's Claim for Turnover**

3       Plaintiff's complaint also seeks turnover of the funds that  
4       he alleges were fraudulently transferred to the Former Partners  
5       by PNB LP. Because the court has concluded that Plaintiff shall  
6       take nothing by his claim seeking avoidance of the alleged  
7       transfers, the Former Partners are also entitled to summary  
8       judgment that Plaintiff take nothing by his claim for turnover.  
9

10                   **Conclusion**

11       For the reasons stated in the foregoing memorandum decision,  
12       The Former Partners have not shown as a matter of law that they  
13       can assert a defense to Plaintiff's claims for avoidance of  
14       fraudulent transfers. The Former Partners are entitled to  
15       summary judgment on Plaintiff's claims for avoidance of transfers  
16       under California Civil Code Sections 3439.04(a)(1), (a)(2) and  
17       3439.05, and on Plaintiff's claim for turnover, as the court  
18       finds that there is no genuine dispute of material fact as to  
19       those claims for relief, and the Former Partners have shown that  
20       they are entitled to judgment as a matter of law that Plaintiff  
21       take nothing by those claims.

22       The court will issue a separate order.

23       Dated: FEB - 7 2008

24                   

25                   Thomas C. Holman  
26                   United States Bankruptcy Judge  
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